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In the Supreme Court of the United States

OCTOBER TERM, 1980

MR. A'S RESTAURANT, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by transferring, threatening, and subsequently discharging employee Mario Aguilar for filing grievances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C-1) is unreported. The decision and order of the National Labor Relations Board (Pet. App. A-1 to A-19 and B-1 to B-2) are reported at 248 N.L.R.B. 990.

JURISDICTION

The judgment of the court of appeals (Pet. App. D-1 to D-3) was entered on March 20, 1981. The petition for a writ of certiorari was filed on June 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment * * * to * * * discourage membership in any labor organization * * *.

STATEMENT

1. Adopting the decision of the administrative law judge, the National Labor Relations Board found that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by transferring, threatening, and subsequently discharging employee Mario Aguilar for filing grievances (Pet. App. B-1 to B-2). The evidence on which the Board's findings are based showed that Mario Aguilar had been a waiter at petitioner's restaurant for approximately four years at the time of his transfer and subsequent discharge. Upon being hired, Aguilar was assigned to work in the bar and grill, which is the station to which all beginning waiters are assigned. Thereafter, Aguilar was progressively moved to the dining room and, finally, to the rotunda, where he worked for two years until he was transferred and then discharged (Pet. App. A-2, A-4; Tr. 7, 46-50).[1]

On February 16, 1979,[2] one of Aguilar's customers walked out of the restaurant without paying his check. Aguilar reported this to his "maitred," Guiseppe Villani, who suggested that Aguilar pay the bill and told Aguilar that he would reimburse Aguilar after he got the money from the customer, whom he knew. Aguilar agreed and paid

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[1]"Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the exhibits introduced by the General Counsel at that hearing.

[2]All dates referred to in this brief are in 1979 unless otherwise noted.

the bill with his own credit card (Pet. App. A-2 to A-3; Tr. 11-13, 128-129).

Aguilar did not hear from Villani over the next few days, and became concerned about receiving his reimbursement. In discussing the matter with other waiters, Aguilar learned that the collective bargaining agreement required the restaurant management to cover for unpaid checks. Thereafter, on February 21, Aguilar consulted with an attorney and had a grievance prepared over the petitioner's failure to cover for the unpaid check. That afternoon, Aguilar brought the grievance to the restaurant's office. General Manager Dominick Alessio asked Aguilar to defer formally filing the grievance until after he had had an opportunity to straighten out the matter with Villani. Aguilar agreed (Pet. App. A-3 to A-4; Tr. 13-17, 160-161, GCX 2).

On the morning of February 22, Villani informed Aguilar that his credit charge had been cancelled and that the unpaid check was not Aguilar's responsibility. However, Aguilar decided that he wanted to have his grievance on file in order to avoid having the same problem arise in the future. Accordingly, Aguilar brought his grievance to the restaurant's office that afternoon and requested that it be placed in his personnel file for future reference (Pet. App. A-3; Tr. 17-19, 161). The following morning, February 23, Aguilar was informed that he had been transferred out of the rotunda and back to the bar and grill. The decision to transfer Aguilar had been made by Villani; Aguilar was not given an explanation for the change in his work station (Pet. App. A-4 to A-5; Tr. 19-20, 23, 138-139).

Over the next week, Aguilar compared the terms of the collective bargaining agreement with working conditions at the restaurant, and uncovered a number of areas which he believed were not in conformance with contractual requirements. Aguilar had a second grievance prepared alleging contract violations with regard to lockerroom conditions,

station assignments, meals and uniforms, and brought it to the restaurant's office on the afternoon of March 1 (Pet. App. A-7; Tr. 24-29, 95-98, GCX 3).

The following morning, March 2, Aguilar was approached by the restaurant's manager, Joe Cutri, who confronted Aguilar and stated, "You son-of-a-bitch." Aguilar stared at him, suprised by the outburst, and Cutri responded, "Don't look at me, look another way. I want to chop your head off" (Pet. App. A-3, A-10; Tr. 30).

A short time later, Aguilar was approached by Alessio and Villani. Alessio informed Aguilar that he was fired because he had taken a one dollar tip left to the captain, Rudy Lawenda, for himself (Pet. App. A-10; Tr. 32-34, 132-133, 151, 155).[3] Alessio then walked away, and Villani and Aguilar continued the discussion. Villani, referring to the grievance, asked Aguilar, "Why you do this to the boss? You have went too far. Why would you ever be unhappy?" Aguilar answered that he was sorry, but that he had already started and could not stop it now. Aguilar then asked Villani why he had been transferred to the bar and grill, and Villani stated that he had done it for Aguilar's own good "until things calm down" (Pet. App. A-11 to A-12, A-15; Tr. 34-35, 134-135).

2. At the hearing before the administrative law judge, petitioner contended that Aguilar had been discharged because he had appropriated Lawenda's tip for himself, and that his transfer had been in keeping with normal practice. The judge rejected both arguments.

In finding that petitioner unlawfully discharged Aguilar, the administrative law judge noted that Villani admitted that Aguilar's grievance had been the motivating factor for

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[3]Aguilar had Lawenda's permission to take the one dollar tip in question, since the waiter's tip had been small; this was a common practice in the restaurant (Pet. App. A-11, A-15; Tr. 36-38).

the discharge (Pet. App. A-15). Thus, Villani, in plain reference to the grievance, asked Aguilar "[w]hy you do this to the boss?" and told Aguilar that he "went too far" by filing his grievance (*id.* at A-11 to A-12). In addition, the judge did not credit the testimony of petitioner's office manager, Betty Newton, that Aguilar had not filed his second grievance until after his discharge (*id.* at A-8 to A-9). Thus, as shown above, Villani referred to the grievance in his conversation with Aguilar, and admitted that he knew about the second grievance prior to the discharge (Tr. 135).[4] Finally, the judge rejected petitioner's claim that Aguilar had been discharged for taking Lawenda's tip. The judge noted that it was a common practice in the restaurant for waiters to take the captain's share of a tip whenever the waiter's tip was small, and that in this instance Aguilar had "secured Lawenda's consent" to take the one dollar tip. Accordingly, the judge concluded that petitioner "seized upon a perfectly normal practice and has attempted to cloak its true motive for terminating Aguilar" (Pet. App. A-15).

With regard to the transfer, the administrative law judge found that the timing and abruptness of the change shortly after Aguilar had filed his first grievance supported the conclusion that the transfer was unlawfully motivated. In addition, the judge noted that Villani's admission to Aguilar that he had been transferred "until things calm down" constituted "an outright confession of unlawful discrimination" (Pet. App. A-13 to A-14). Finally, the judge rejected petitioner's asserted defense that the transfer was a normal business practice, since the record showed that it was "unprecedented" for an experienced waiter to move back to the bar and grill (*id.* at A-14). The judge concluded (*id.* at

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[4]The judge also found (Pet. App. A-15) that Cutri's remarks were in reference to the grievance and were unlawful threats of reprisal in violation of Section 8(a)(1) of the Act. See *NLRB* v. *Adams Delivery Service, Inc.*, 623 F. 2d 96, 99 (9th Cir. 1980).

A-13) that "the transfer and subsequent discharge of Aguilar had been motivated by an intent to retaliate against him for * * * having filed grievances."

3. The court of appeals upheld the Board's decision and enforced its order. The court observed (Pet. App. C-1) that "the determination of motive is a matter particularly within the purview of the Board" and concluded that the "findings of the Board concerning [petitioner's] unlawful retaliatory motive are supported by substantial evidence."

ARGUMENT

Petitioner asks this Court to grant certiorari to resolve a conflict among the circuits as to the standard to be applied in discriminatory discharge cases when there is evidence that an employer had both proper and improper motives for the discharge (Pet. 4-5). However, that question is not presented on this record. The Board's finding here, which was affirmed by the court of appeals, was that petitioner was not motivated by a valid (non-pretextual) reason in transferring and subsequently discharging Aguilar. The sole basis for those discriminatory acts was to retaliate against him for filing grievances. Thus, the only question presented in this case is whether substantial evidence supports the Board's finding that the business considerations advanced for the transfer and discharge were a pretext, and not a motive, for those actions. That evidentiary issue does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner's assertion (Pet. 5), the Board did not improperly place the burden of proof on petitioner.[5]

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[5]In *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980), the Board announced its new test for considering Section 8(a)(3) discharge cases to conform to the analysis set forth by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252

The General Counsel made a *prima facie* showing that the transfer and discharge were discriminatorily motivated—by proving that both actions came within one day of Aguilar's filing of a grievance, that both were abrupt, and that Villani admitted that both were the result of the grievances.

Accordingly, the burden of proof shifted to petitioner to establish that it had a legitimate business reason for the transfer and discharge. As the Board found, petitioner failed to sustain its burden. The evidence did not support petitioner's contention that Aguilar was transferred as a normal business practice. Petitioner did not establish that it was a normal practice to rotate waiters periodically (Pet. App. A-6), and Villani had no explanation for either the timing of the transfer or the selection of Aguilar for transfer (*id.* at A-6 to A-7). Indeed, there was no evidence that a waiter had ever previously been transferred from the rotunda station back to the bar and grill (*id.* at A-6).

Similarly, petitioner failed to prove that Aguilar had been discharged for taking Lawenda's one dollar tip. The undisputed evidence showed that it was common practice for waiters to take for themselves the tip allocated for the

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(1977). Under the *Wright Line* approach, the General Counsel has the initial burden to make a *prima facie* showing "sufficient to support the inference" that a discharge was unlawfully motivated. The burden then shifts to the employer to demonstrate that the employee would have been discharged "even in the absence" of the unlawful reason; that is, that there was a legitimate business reason for the discharge. *Wright Line, supra*, 105 L.R.R.M. at 1175. As the Board noted, however, if an examination of the employer's evidence reveals that "the asserted justification is a sham in that the purported rule or circumstance * * * did not exist, or was not, in fact, relied upon" (*id.* at 1170), it is apparent that the unlawful motivation was the only reason for the discharge. Since, in this case, the Board found (Pet. App. A-15) that petitioner's asserted reason for the discharge was merely an attempt to "cloak its true motive for terminating Aguilar," no question of dual motivation is presented. See *NLRB* v. *Nevis Industries, Inc.*, 647 F. 2d 905, 909-910 (9th Cir. 1981) (adopting the *Wright Line* test).

captain, and that Aguilar in this instance had secured Lawenda's permission to take the one dollar tip for himself. In these circumstances, the evidence clearly established that petitioner "seized upon a perfectly normal practice" as a "cloak" and that its true motive for transferring and then discharging Aguilar was to retaliate against him for filing grievances (Pet. App. A-15).[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Contrary to petitioner's contention (Pet. 6-7), the court of appeals clearly addressed the issues in this case and concluded that the Board's findings of "unlawful retaliatory motive are supported by substantial evidence" (Pet. App. C-1). Given the Board's finding that petitioner's claimed motive was a sham, there was no occasion for the Board or court to determine whether it was the dominant motive.

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